

# IN THE MISSOURI COURT OF APPEALS WESTERN DISTRICT

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## COMPLETE TITLE OF CASE

STATE OF MISSOURI,

Respondent,

v.

ROBERT JOHNSTONE,

Appellant.

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**DOCKET NUMBER** WD78199

**MISSOURI COURT OF APPEALS  
WESTERN DISTRICT**

**DATE:** January 19, 2016

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## APPEAL FROM

The Circuit Court of Grundy County, Missouri  
The Honorable Terry A. Tschannen, Judge

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## JUDGES

Division Three: Ellis, P.J., and Mitchell and Witt, JJ.

CONCURRING.

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## ATTORNEYS

Chris Koster, Attorney General  
Evan J. Buchheim, Assistant Attorney General  
Jefferson City, MO

Attorneys for Respondent,

Casey A. Taylor, Assistant Public Defender  
Columbia, MO

Attorney for Appellant.

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## MISSOURI APPELLATE COURT OPINION SUMMARY MISSOURI COURT OF APPEALS, WESTERN DISTRICT

STATE OF MISSOURI, )  
 )  
 Respondent, )  
 v. ) **OPINION FILED:**  
 ) **January 19, 2016**  
 ROBERT JOHNSTONE, )  
 )  
 Appellant. )

**WD78199**

**Grundy County**

**Before Division Three Judges:** Joseph M. Ellis, Presiding Judge, and Karen King Mitchell and Gary D. Witt, Judges

Robert Johnstone appeals, following a jury trial, his conviction of first-degree child molestation, under § 566.073, for which he was sentenced to five years' imprisonment. Johnstone argues that the trial court erred in both excluding the victim's deposition from evidence and overruling his motion for new trial based upon alleged juror misconduct.

**AFFIRMED.**

**Division Three holds:**

1. To be admissible under § 491.075, a child witness's out-of-court statements must be reliable, regardless of whether admission is sought by the defendant or the state.
2. Rule 25.13 precludes admission of a deposition, in its entirety, where the deponent is available and testifies at trial.
3. To the extent Rule 25.13 and § 491.075 conflict, Rule 25.13 prevails on procedural matters.
4. Where the deponent is available and testifies at trial, a party seeking to impeach the deponent may offer only those parts of the deposition that tend to impeach; it is not admissible in its entirety under the rule of completeness.

5. The trial court did not err in refusing to admit the victim's deposition in its entirety, where the victim was available and testified at trial, and the defendant was permitted to use those portions of the deposition that tended to impeach the victim's testimony.
6. Where a claim of juror nondisclosure arises, the court must first discern whether there was any nondisclosure at all. If a juror's response fully answers the question posed, there is no nondisclosure.
7. If nondisclosure has occurred, the court must then discern whether the nondisclosure was intentional or unintentional.
8. If the nondisclosure results from the juror's misunderstanding of the question, the court must determine whether the misunderstanding was reasonable.
9. The reasonable interpretation of the question depends on the context of the question as well as the wording of the question. And confusion may result when counsel narrows the focus of the question.
10. Where nondisclosure is unintentional, the party claiming nondisclosure bears the burden of demonstrating prejudice.
11. The trial court did not err in overruling the defendant's motion for new trial, claiming juror misconduct, because the defendant failed to prove any nondisclosure occurred. And even if it had, it would have been unintentional, and the defendant failed to prove any prejudice.

**Opinion by: Karen King Mitchell, Judge**

January 19, 2016

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